In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-87

CECIL EUGENE HARRIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Texas, petitioners were convicted of having conducted an illegal gambling business in violation of 18 U.S.C. 1955. The court of appeals affirmed without oral argument in a lengthy opinion (Pet. App. A, pp. 18-41).

Petitioners contend, as they did below, that Congress exceeded its power under the Commerce Clause, and violated the Tenth Amendment, in enacting 18 U.S.C. 1955 since that Section does not require proof in an individual case of any effect on interstate commerce from the illegal gambling enterprise. They also argue that the statutory definition of an "illegal gambling

business" as consisting of at least five persons who "conduct, finance, manage, supervise, direct, or own all or part of such business" was not met here since two of the persons on whom the government relied (petitioners Bumpass and Littlefield) were non-supervisory employees. In the main we rely upon the thorough discussion of these contentions contained in the opinion below. (See Pet. App. A, pp. 21–37). We note, in addition, that the constitutionality of the statute has been sustained by all the other courts of appeals that have decided the question under principles announced in *Perez* v. *United States,* 402 U.S. 146. See *United States* v. *Becker,* C.A. 2, No. 72–1105, decided May 30, 1972; *United States* v. *Riehl,* C.A. 3, Nos. 71–2133, 71–2134 and 71–2135, decided May 9, 1972; *United States* v. *Palmer,* C.A. 6, Nos. 71–1596 and 71–1597, decided March 31, 1972, petition for a writ of certiorari pending No. 72–2; *Schneider* v. *United States,* C.A. 8, Nos. 71–1393 and 71–1572, decided April 12, 1972.

The contention that Section 1955 did not mean to include nonsupervisory employees in the concept of those who "conduct", a gambling business is, as the court below held (Pet. App. A, pp. 35–36), refuted by the legislative history of 18 U.S.C. 1511, enacted together with Section 1955. Section 1511 prohibits conspiracy to obstruct the enforcement of the criminal laws of a state with the intent to facilitate an "illegal gambling business." Section 1511 defines an "illegal gambling business" in the same terms as Section 1955. The legislative history of Section 1511 indicates that "Congress' intent [in Section 1955] was to include all

those who participate in the *operation* of a gambling business, regardless how minor their roles * * * and to exclude only customers of the business." *Becker, supra,* slip op. p. 4 (emphasis in original). That indeed is the natural meaning of "conduct" in the context of a gambling business.

Finally, we note that Rule 18 of the Fifth Circuit, allowing that court to dispense with oral argument as in this case, has been held not to constitute a denial of the effective assistance of counsel. See *e.g., Hoyt and Bowman* v. *United States,* Nos. 71–5907 and 71–5952, certiorari denied, 405 U.S. 995; *Grimes and Guinn* v. *United States,* Nos. 71–1277 and 71–1296, certiorari denied, June 12, 1972; see also *United States* v. *Baber,* 447 F. 2d 1267, 1270–1271 (C.A. D.C.), certiorari denied, 404 U.S. 957.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1972.

U.S. GOVERNMENT PRINTING OFFICE 1972